No. 80-384

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

-vs.-

SAMUEL UNGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent SAMUEL UNGER prays that hearing be granted, and that upon hearing, that the Court find that no First Amendment rights of petitioner MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE, ("CENTRAL COMMITTEE"), have been violated, and affirm the Unger decision, (1 Civil 47927).

Hearing should be granted because, although First Amendment issues were elaborately briefed and argued by both UNGER and CENTRAL COMMITTEE below, nevertheless the Court of Appeal opinion did not articulate the First Amendment issues. (The opinion devotes all of two sentences and one footnote to First Amendment issues.) The result is at least four pending state actions litigating as to whether or not Unger decided the First Amendment issues, (it did); and as to what political organizations Article II, Section 6, California Constitution applies, (it applies at least to all partisan parties qualified for and receiving substantial state aid, (hereinafter called "Partisan Parties")). Further, the Court of Appeal opinion omits a compelling reason why no First Amendment rights of CENTRAL COMMITTEE were violated, namely: the

CENTRAL COMMITTEE is the mere agent of party members, and is not the party; such that in the absence of any poll or caucus of party members, the CENTRAL COMMITTEE is totally unauthorized, and acts ultra vires, in "officially" selecting any party candidate for any office; and its "official" endorsements are a false representation to the electorate, (therein damaging to other candidates), that the endorsees are the official candidates of the Democratic Party.

CONSTITUTIONAL HISTORY, AND FACTS

The California Direct Primary Law of 1913, enacted under authority of former Article II, Section 2 1/2, California Constitution, provided for nomination of candidates for both partisan and nonpartisan offices by direct vote. Its pith was that party executive committees were prohibited from selecting candidates

for any election, partisan or nonpartisan, this selection being placed entirely in the hands of party members, (in the case of partisan offices), and in the hands of the entire electorate, (in the case of nonpartisan offices). (The general or runoff election followed the primary election of partisan and nonpartisan candidates, respectively.) This system has continued to this day, (with modifications not germane to case at bar). (See McClintock v. Abel (1937) 21 Cal.App.2d 11). A corollary of this system is that state-aided Partisan Parties are the only parties permitted to participate in the partisan elections for state and federal office, but are absolutely barred from participation in the municipal, school and judicial nonpartisan elections.

In 1926, former Section 2 3/4 of Article II was added to further specifically provide for nonpartisan elections. In 1972, Article II, Section 6 replaced former

Section 2 3/4, providing:

"Judicial, school, county, and city offices shall be nonpartisan."[1/]

(Note, that the 1972 initiative ballot argument stated only: "Judicial, school, county, and city offices would be continued as nonpartisan offices." (Emphasis supplied).

By reason of this constitutional history, there has been nearly a century of no selection of candidates by Partisan Parties in nonpartisan elections. In the last decade, however, Democratic Party central committees in the San Francisco Bay Area have been seizing power to the central committees by endorsing, aiding and funding selected Democrats as official party candidates in nonpartisan elections, -- without any poll or caucus of party members, to boot. (See affidavits

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(1) Originally Article II, Section 5, added November 7, 1972 by initiative, renumbered June 8, 1976.

of party chairmen referred to in Court of Appeal opinion.) Case at bar arises from this background.

Thus, for the November 6, 1979 election to four seats on the Marin Community College District governing board, (lying entirely within Marin County), there were 13 candidates, -- six Democrats, four Republicans, and three independents, (including UNGER). In September 1979, without any poll, caucus or by-your-leave of party members, the CENTRAL COMMITTEE unauthorizedly selected four Democrats as party candidates, publicized the endorsements, and planned to contribute party funds to these candidates. Three of the four endorsees won election.

POINTS AND AUTHORITIES

I. The law of agency, acceded to by state party history, demonstrates that county central committees do not have authority, in any event, to select party candidates,

(this function being reserved, if at all, to party members acting in polls or caucuses). Absent any poll or caucus of party members, CENTRAL COMMITTEE is not authorized to speak or act on the subject, hence no First Amendment rights are violated.

In a masterful historical summary of agency law and California central committee authority, 23 Opinions Attorney General 119 (1954 Cal.Atty.Gen.), concluded:

(1) That neither by agency law, legislative history, or party custom can central committees select party candidates, and,

(2) The function of selecting party candidates is reserved to and is performable only by party members at a caucus or poll.

23 Opinions Attorney General notes at 121-123:

" . . . (I)n the convention era the central committee's basic function was to accept and campaign for the convention's nominees. Party usage apparantly did not permit the committee to anticipate the convention's choice by presenting it with an "official" pre-convention slate or use party funds to push one of several pre-convention aspirants. It would be naive to suppose that the central committees of those days meticulously refrained from attempts to steer the conventions. What such a committee might do as a group of individuals or an unofficial caucus is one thing. What it might do as a representative party organ, taking official action at an official meeting, is another. Such limitations

as existed applied to the committee solely in its official, representative character."

Construing former Section 2832 Calif. Elections Code, (now Section 8942 Elections Code), (heavily relied upon by CENTRAL COMMITTEE), -- providing that county central committees:

" . . . shall perform such other duties and services for their respective parties as seem to be for the benefit of the party.",

the opinion concluded that this subsequen statute did not change the agency rule:

"Where, however, several candidates of the same party are contending for the party's primary election nomination, then the committee's endorsement is not for the benefit of the party. Instead, it is aimed at benefiting an individual or group within the

party." 23 Opinions Attorney General at 123.

(We note that 23 Opinions Attorney General 119 is, by parity of reasoning, applicable with force to the nonpartisan election situation at bar.)

People v. Crutcher (1968) 262 Cal.App.2d 750, 752:

> "The influence of the official political body may not be used for or against any party member."

All this is in accord with black letter law, set forth in 25 Am.Jur.2d, Elections, §145:

> " . . . (I)n some jurisdictions nominations for particular offices,ordinarily local in nature, are permitted by statute or by party custom or usage to be made by party caucus or unofficial primary. A caucus is simply a gathering of the members of

> <u>one political party</u> for the purpose of selecting . . . persons who, in the opinion of the majority of those composing such caucus, it would be desireable to elect. . . . To be valid, a party caucus must be duly called and noticed by the proper authority . . . ", (citing many cases). (Emphasis supplied).

The caucus or poll of party members is the breath of democracy and the means and the justification, if any, for authorizing party members to exercise their right of suffrage through political parties. The First Amendment does not prohibit restraint on unauthorized speech, (i.e., unauthorized endorsements), nor on false representations to the electorate that certain candidates are the official Democratic Party candidates, (when in fact no selection process by party members has occurred).

II

California has a compelling state interest, subsumed under the 10th Amendment, to preserve nonparty impartiality, -- and the appearance thereof, -- in the acts of judicial, school, county and city officers, by the narrowly drawn means of prohibiting only state-aided Partisan Parties from nonpartisan elections. Such prohibition does not infringe upon acts or speech integral to the right to vote or the elective process. Further, the classification is reasonable, hence equal protection is not violated.

It is one thing to say that a corporate entity has an interest and right in effectively speaking and associating with other non-state-aided entities and individuals. First Bank of Boston v. Bellotti (1978) 435 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.ed.2d 707. It is quite another thing to say that corporate

entities and individuals have a right to use substantial state aid in their combination so as, thereby, to dominate, tend to dominate, or appear to dominate either or both (1) the result of municipal and judicial elections, and (2) official acts of officers so elected, when such state-aided combinations are neither a necessary or integral part of the elective machinery for those offices. This is especially true when the offices involved are judicial, academic, and administrative.

We concede, and agree with Buckley v. Valeo (1976) 424 U.S. 1, 46 L.ed.2d 659, 96 S.Ct. 612, that state-aided Partisan Parties are truly necessary and an integral part of the elective process in statewide and national elections. How else is a candidate for governor or federal office to campaign, and how are the statewide voters to learn about the

candidate and his views if not by a Partisan Party process which selects the candidate in the first place, and then puts its organization, funding and publicity behind him.

It is quite a different scenario in local and judicial elections, however; and there we part company with Buckley. There, in nonpartisan local and judicial elections,

> " . . . the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization". Communist Party v. Peek (1942) 20 Cal.2d 536, 544.

In such elections, without a party, a nonpartisan candidate in California can easily place himself on the ballot with

a self-obtained nominating petition; he can "walk the precincts" in all or most of the significant precincts involved; and the voters are few enough or so geographically close together that he can raise sufficient funds by which to reach them, -- all without Partisan Party backing.[1/] Hence, Peek was correct in its holding. Also, the state's electorate impliedly so found in adopting Article II, Section 6, California Constitution as an initiative. Further, CENTRAL COMMITTEE has utterly failed in even attempting to show factually that the implied findings of the Direct Primary Law of 1913, and of Article II, Section 6, were not or are not true today.

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(1) We contend this is applicable to the offices of Court of Appeal and Supreme Court justices. They are initially appointed, and campaign statewide only on a "Yes" or "No" issue of retention in office. See recent developments, 55 Calif.State Bar Journal 414 (Oct 1980). None has ever required party aid to be reelected.

Further, Morial v. Judiciary Comm. of State of La. (1977 5th Cir.) 565 Fed.2d 295, and U.S. Civil Service Comm. v. Natl. Assn. of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.ed.2d 796 (1973) appear to hold that governments have a compelling interest, "entitled to the greatest respect", in ensuring both the impartiality and the appearance of impartiality in the judicial and bureaucratic administration of the laws, -- particularly where the prohibition does not burden either the individual's right to vote nor the free statement of the individual's views in a non-official capacity. (There is nothing to prevent CENTRAL COMMITTEE members, -- without identifying themselves as such, -- from renting the biggest billboard in Marin County and endorsing, as individuals, any candidate for non-partisan office.)

Morial and Letter Carriers but restate

the received American wisdom on this point:

> " . . . mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care," so long as "the right of the individual to vote for the candidate of his choice is not interfered with . . . " State v. Anderson (Wisc.) 76 N.W.48?

III

The Democratic Party and other Partisan Parties receive substantial state aid which gives them extra political power. California had to furnish such state aid, willy-nilly in the first place, to regulate corrupt practices of Partisan Parties. California has the right to condition such substantial state aid on the requirement that state-aided Partisan Parties not use this extra, state-derived political power in nonpartisan elections.

The California Democratic Party has been swimming so long in the ocean of state aid that it is no longer aware that it is the recipient of substantial state aid which gives it extra clout. At the turn of this century, the state took over, at its expense, the performance of important Partisan Party functions, because:

> " . . . the evils sought to be remedied by the adoption of section 2 1/2 of article II of our constitution were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat instead of to express the will of political parties." Katz v. Fitzgerald (1907) 152 Cal. 433, 434.

Thus, the Democratic Party and the other four Partisan Parties which have registered members equalling 1% of the votes cast at the last gubernatorial

election, qualify for and receive the following state aid:

(1) County clerks register party members by Partisan Party affiliation, keeping membership lists current and available to the Partisan Parties;

(2) The state conducts central committee elections of Partisan Parties, (Sections 8870, 9370, 9720, 9760, Calif. Elections Code);

(3) The state conducts Partisan Party nominating polls, called primary elections, for state and federal party candidates, (Section 6400, Calif. Elections Code); and,

(4) The Partisan Party nominee automatically goes upon the general election ballot, under the party label, (Section 10210, Calif.Elections Code).

Performance of these expensive and important logistical party matters by the state also prevents intercine

warfare between party factions. Such substantial state aid clearly gives qualified Partisan Parties such as the Democratic Party enormous superiority in party organization, continuity, and legitimacy, in comparison with all other non-qualified organizations, to the degree that it is more than reasonable, -- indeed, necessary, -- for the state to impose the condition upon Partisan Parties that they not use this extra, state-derived power in nonpartisan elections.

(In this view of the matter it appears that California either considers non-state-aided organizations as not being recognizable political parties,[1] and

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(1) " . . . there is no constitutional recognition of any body of men calling themselves a party until three percent of the vote has been cast by such body." Katz v. Fitzgerald (1907) 152 Cal. 433, 436.

hence not within the scope of Article II, Section 6, (the view we take); or else, if California does consider non-state-aided organizations to be political parties,[1] that they are nevertheless such minnows that they pose no threat to nonpartisan office impartiality on a statewide basis, and are not includible within the intent of Article II, Section 6 on that account. Under either view of non-state-aided organizations, no equal protection issue is apparant, inasmuch as the different treatment afforded state-aided Partisan Parties has a rational basis.

IV

Comment on Florida cases cited by petitioner.

Concerned Democrats v. Reno (1978 D.C.S.D.Fla.) 458 F.Supp. 60, agrees with

(1) "A political party is an organization of electors believing in certain principles concerning governmental affairs and urging the adoption and execution of these principles through the election of their respective candidates at the polls." Socialist Party v. Uhl (1909) 155 Cal. 776,793.

the Unger decision in holding that a statute, (Fla.Statute, §105.071(7)), which in effect prohibits contributions by parties to nonpartisan candidates, does not violate the First Amendment. (The rest of Concerned Democrats is a nonsequitur.)

Abrams v. Reno (1978 D.C.S.D.Fla.) 452 F.Supp. 1166, inexcusably fails to recognize or be aware of the agency principle which prohibits a mere agent of a party from supporting or opposing any candidate for party endorsement, prior to a caucus or poll by party members on that very subject.

SUMMARY

For nearly a century, the people of the State of California, exercising their 10th Amendment right, through their own right of initiative in their own state constitution, have effectively maintained, against the world,

-- a viable system of nonpartisan election of judicial, academic, administrative and local officers, and

-- a prohibition against selection of Partisan Party candidates, if at all, by unrepresentative, undemocratic fiat of executive committees.

These requirements do not interfere with any CENTRAL COMMITTEE member's right to vote, nor do they prohibit or limit in any manner the right of individual CENTRAL COMMITTEE members, acting individually, to speak and aid any candidate, or to associate with individuals or non-Partisan Party groups in speaking for or aiding any candidate in nonpartisan elections. Unlike the Buckley v. Valeo situation, (to wit, elections for federal office), state-aided Partisan Party participation in nonpartisan elections in California has never been necessary

either to educate the electorate about the nonpartisan candidate and his views, or to enable the nonpartisan candidate to effectively campaign. (The people in enacting Article II, Section 6 as recently as 1972 have so found; and CENTRAL COMMITTEE adduces no facts to the contrary.) Hence, state-aided Partisan Party participation in nonpartisan elections is not and never has been an integral part of the state's nonpartisan elective machinery.

Thus, even if California had no compelling interest in the matter, its exercise of its sheer 10th Amendment right to select its own nonpartisan political system, free from interference of the federal government, does not, in the facts at bar, violate the Bill of Rights. In addition, however, California has a compelling state

interest in ensuring nonparty impartiality, and the appearance of impartiality, in the acts of its municipal, academic, administrative and judicial officers. Given this compelling state interest and the mix of facts in case at bar, the Bill of Rights is implemented by Article II, Section 6, not violated.

Lastly, there is no equal protection violation involved. By legislative history, Article II, Section 6 and its predecessors applies only to state-aided Partisan Parties, i.e., organizations having registered members equalling 1% of the votes cast at the last gubernatorial election, or which had a statewide candidate in the last gubernatorial election receiving 2% of the votes cast. (Section 6430 Calif. Elections Code). Such classification is reasonable, in view of the fact that organizations having fewer than 1% of the registered voters of the

state clearly pose no threat to preserving nonparty impartiality in the acts of judicial, school and municipal officers, whereas Partisan Parties receiving state aid, (such as the Democratic Party having approximately 50% of the registered voters), do pose such a threat. (Such implied findings of Article II, Section 6 and its predecessors are not rebutted by any evidence adduced by CENTRAL COMMITTEE.)

WHEREFORE, respondent prays that this Court grant a hearing, and after hearing, find and determine that no First Amendment rights of CENTRAL COMMITTEE are violated by Article II, Section 6, California Constitution, for the reasons stated in this brief; and that respondent have his costs and such other and further relief as the Court may deem proper.

Respectfully submitted,

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